IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RODNEY A. MYERS
AND DIANE M. MYERS,

Petitioners Below (Appellees),

v.

No. 35470
From the Circuit Court of Lewis County, West Virginia
Civil Action No. 08-C-126

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent Below (Appellant).

BRIEF AND CROSS ASSIGNMENT OF ERROR, ON BEHALF OF THE APPELLEES, RODNEY A. MYERS AND DIANE M. MYERS

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OF WEST VIRGINIA

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I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This appeal arises from a September 3, 2008, final administrative order and decision of the West Virginia Consolidated Public Retirement Board ("Board"), which denied Appellee, Rodney A. Myers' ("Mr. Myers") request to include his lump sum payment for unused annual leave in calculating his final average salary for the purpose of determining his retirement annuity and to reinstate two months of service credit. By a Final Order dated July 2, 2009, the Circuit Court of Lewis County (Judge Thomas H. Keadle, presiding), reversed the Board's decision, allowing Mr. Myers to include the lump sum received from accrued annual leave in

calculating his final average salary. In reversing the Board's decision, Judge Keadle concluded that "the decision of the Board regarding inclusion of a lump sum payment for unused annual leave in calculation of final average salary was contrary to law and 'clearly wrong in view of the reliable, probative and substantial evidence on the whole record.'" See Final Order, p. 15, July 2, 2009.

The Circuit Court of Lewis County affirmed the Board's decision to deny Mr. Myers' request for the Board to reinstate two months of service credit. Judge Keadle concluded that "the decision of the Board regarding reinstatement of service credit were [*sic*] not contrary to law or a lawfully adopted rule or policy, did not exceed the Board's statutory authority, were not the result of fraud or deceit, were not clearly wrong, and were not arbitrary and capricious." See Final Order, p. 14, July 2, 2009.

Therefore, it is from the July 2, 2009 decision of the Circuit Court of Lewis County, which reverses the Board's administrative decision regarding the lump sum payment in the calculation of retirement benefits, that the Appellants now appeal. In his response, the Appellee includes a cross assignment of error, regarding Judge Keadle's decision to affirm the Board's administrative decision to deny reinstatement of two months of service credit.

II. STATEMENT OF FACTS

Mr. Myers worked full-time for the West Virginia Department of Transportation, Division of Highways, as a civil engineer, from June 1, 1976 until his retirement on January 1, 2008. Mr. Myers was recruited for full-time employment with the Division of Highways through a Co-Operative Education Program. Through said program, undergraduate students were eligible

to work for the Division of Highways during the summers, in exchange for maintaining adequate academic performance in a civil engineering program. Because employment through the program was considered part-time, no retirement system contributions were made on an individual's behalf, nor was any service credit accrued for those periods. Upon completion of the program, students were eligible to apply for full-time employment with the Division of Highways. Mr. Myers participated as a student engineer in the program during the summers of 1972, 1973, 1974, and 1975. During the summer of 1972, the Division of Highways mistakenly recorded Mr. Myers as a full-time employee, and retirement system contributions were both withheld from his pay and made on his behalf to the West Virginia Public Employees Retirement System (PERS), and he accrued two months of service credit. Mr. Myers did not receive retirement system contributions or service credit for his employment during the summers of 1973, 1974, or 1975. Upon graduation from West Virginia University and completion of the requirements of the co-op program, Mr. Myers became a full-time employee of the Division of Highways on June 1, 1976.

Mr. Myers faithfully served the Division of Highways as a full-time, permanent employee for over thirty (30) years. During his career with the Division of Highways, Mr. Myers received several offers of employment in the private sector, however, he remained loyal to the State, in part due to his reliance upon the significant benefits he anticipated receiving upon retirement. At the completion of his service, Mr. Myers had accrued over thirty (30) years of service credit and 512 hours of unused annual leave. As permitted under W. Va. Code § 5-5-3, upon retirement, Mr. Myers requested and received a lump sum payment of $17,490 for his unused annual leave. Because monthly retirement benefits are based on a state employee's

earnings for the last three years of their employment, Mr. Myers anticipated that the lump sum he received for his unused annual leave would be included in the computation of his final average salary.[1] In fact, the West Virginia Legislature provided for such a benefit for eligible employees[2] in the 1988 amendment of W.Va. § 5-5-3. The amended statute provided that lump sum payments, including payments from annual leave, would be included in the computation of an eligible retiring employee's final average salary:

> Every eligible employee, as defined in section one of this article, at the time of his or her active employment ends due to resignation, death, retirement, or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued. In determining the amount of annual leave entitlement, weekends holidays, or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, *such lump sum payment is to be part of final average salary computation*; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: Provided, That the superintendent of the department of public safety shall make deductions for retirement system contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period service. W.Va. Code § 5-3-3 (1988). (emphasis added)

On or about November 17, 2007, Mr. Myers submitted a request to the

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[1]"Final average salary" is defined, in part, in W.Va. Code §5-10-2(15) as follows: "...(a) The average of the highest annual compensation received by a member...during any period of three consecutive years of his credited service contained within his or her ten years of credited service immediately preceding the date his or her employment with a participating public employer last terminated..."

[2]"Eligible" employee is defined in W.Va. Code § 5-5-1. Under said definition, Appellee was an eligible employee from June 1, 1976 to January 1, 2008.

administrative oversight body of PERS – the Board. Mr. Myers requested that the annual leave lump sum payment be calculated in his final average salary, for the purpose of determining his retirement annuity. In response to Mr. Myers' request, the Board notified him on or about December 17, 2007, that his request was denied. In their denial, the Board acknowledged Mr. Myers' position that he had relied on the 1988 statutory language enacted by the Legislature, but the Board believed that it was not reasonable for Mr. Myers to rely on said statute.

The Board's reasoning is based on the Legislature's 1989 amendment of W.Va. Code § 5-5-3, which removed the language that allowed lump sum payments to be part of the final average salary computation. The 1989 statutory language specifically stated that "lump sum payment for unused, accrued leave of any kind or character may not be part of a final average salary computation," and said statute remains in effect. However, when the Legislature removed the benefit of allowing lump sum payments to be utilized for the purpose of determining final average salaries, the State did not offer her employees any benefit in its' place. Here, the 1989 amendment results in Mr. Myers receiving approximately $320 less per month than he would have received under the 1988 statutory amendment.[3]

Despite the Appellant's assumption that Mr. Myers did not rely on the statutory language of W.Va. Code § 5-5-3 enacted in 1988, Mr. Myers did in fact rely on said language. First, Mr. Myers, at the time of the 1989 amendment, had been a full-time employee of the State of West Virginia for thirteen (13) years. Secondly, Mr. Myers received and turned down other employment offers throughout his tenure with the State. Finally, although Mr. Myers would not have been eligible to retire during the effective period of the 1988 amendment, had his

[3]Note that Mr. Myers received his first monthly retirement benefit on February 20, 2009.

employment ended due to resignation or otherwise, the lump sum payment he would have received for unused, accrued annual leave would have been part of his final average salary computation for retirement benefits.

Subsequent to receiving the Board's letter on December 17, 2007, Mr. Myers followed the proper appeal procedure to the Board. The appeal was two-fold: 1) To request the lump sum payment for unused annual leave to be calculated into his final average salary for purposes of his retirement annuity, and 2) To request reinstatement of two months of service credit. Hearing Examiner Jack W. DeBolt issued a Recommended Decision on May 20, 2008, denying both requests. The Board issued a Final Order on September 3, 2008, in which they adopted Hearing Examiner DeBolt's recommendations in their entirety. As stated, Judge Keadle reversed the decision regarding the lump sum payment, and affirmed the decision regarding service credit in his Final Order entered July 2, 2009.

III. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia's review of a circuit court's decision in an administrative appeal is *de novo*. However, as stated in Marfork Coal Co. v. Callaphan, 215 W.Va. 735, 601 S.E.2d 55 (2004), the Supreme Court is subject to the same standard of review as a circuit court, as promulgated in the West Virginia Administrative Procedure Act. The Act, in part, states the following:

> (g) The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or

order are: (1) in violation of constitutional or statutory provisions, or (2) in excess of statutory authority or jurisdiction of the agency, or (3) made upon unlawful procedure, or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code § 29A-5-4(g).

III. AUTHORITIES RELIED UPON

Statutes

U.S. Const., Art. I, § 10, Cl 1 8

W.Va. Const., Art. III, § 4 8

W.Va. Code § 5-5-1 4

W.Va. Code § 5-5-3 ..... *passim*

W.Va. Code § 5-10-2(15) 4

W.Va. Code § 29A-5-4(g) 6, 7

Cases

Adams v. Ireland, 207 W.Va. 1, 528 S.E.2d 197 (1999) ..... *passim*

Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1994) ..... *passim*

Dadisman v. Moore, 181 W.Va. 779, 384 S.E.2d 816 (1988) ..... *passim*

Gibson v. W.Va. Dep't of Hwys., 185 W.Va. 214, 406 S.E.2d 440 (1991) 13

Kyriazis v. Univ. of W.Va., 192 W.Va. 60, 450 SE.2d 649 (1994) 13

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IV. DISCUSSION OF LAW

A. THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT AN UNCONSTITUTIONAL IMPAIRMENT EXISTS WHEN A PUBLIC EMPLOYEE HAS RELIED ON A STATUTORY PROVISION TO THEIR DETRIMENT.

The contractual relationship between the State and its employees has been previously defined by this Court. In Dadisman v. Moore, 181 W.Va. 779, 384 S.E.2d 816 (1988), an action based on allegations that PERS was not properly funded, this Court held that not only are an employee's rights under a statutorily-created pension system contractual rights, but that these rights are protected by our Constitutions (see § 4, U.S. Const., Art. I, § 10, Cl.1; W.Va. Const., Art. III). The contract clauses in our Constitutions effectively limit the power of a state to modify its contracts with other parties. In general, a statute is treated like a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature. Id. at 789. In Dadisman, this Court specifically addressed the contractual relationship between the State and PERS plan participants, by holding:

> Retired and *active* PERS [Public Employees Retirement System] plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State. Id. at Syl. Pt. 16. (emphasis added)

However, this Court acknowledged in Dadisman that the State must retain some ability to amend statutes relating to pension plans.

The holding in Dadisman was clarified in Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1994), an action concerning whether certain amendments to the State's public safety

pension plan impair contract obligations under the contract clause in the W.Va. Const., Art. III, § 4. In Booth, this Court clarified that the pension rights of *all* current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all. Booth at Syl. Pt. 19. The Court defined "detrimentally alter" to mean that the legislature cannot reduce existing benefits without offering equal benefits in their place as just compensation. Id. Although changes can be made to employee pension plans for those with so few years of service, that it would be unreasonable to say they substantially relied to their detriment, ten (10) years of state service constitutes a presumption of detrimental reliance. Id. at 340. Additionally, this Court stated:

> Substantial employee participation in the system does create an employee's reliance interest in pension benefits. An employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and relied to his or her detriment. Id. at Syl. Pt. 7.

In a subsequent holding, this Court noted that the holdings of Dadisman and Booth do not suggest that the Constitutions prevent the legislature from amending public employee pension statues:

> The Legislature may alter the statutes as it sees fit, but any alterations must have a *prospective* effect, and cannot adversely affect the contractual rights of existing state employees who relied upon the statue to their detriment. Adams v. Ireland, 207 W.Va. 1, 7, 528 S.E.2d 197, 203 (1999). (emphasis added)

The primary issue presented in Adams was whether the Legislature's 1989 amendment to W. Va. Code § 5-5-3 unconstitutionally impaired the appellant's employment contract with the State. The Appellant, Mr. Donald R. Adams, retired from the State of West

Virginia in 1996, at the age of 60, after 36 years of faithful service. As a retired state employee, Mr. Adams was entitled to retirement benefits from the statutorily-created pension plan administered by the Board. At the time of his retirement, Mr. Adams had 320 hours of accrued annual leave, amounting in an additional $6,622 that would have been calculated in his final average salary under the 1988 amendment of W. Va. Code § 5-5-3. Although Mr. Adams chose to continue working, he was eligible to retire in 1988. Mr. Adams alleged that his decision to continue working was based in reliance upon the 1988 amendment of W.Va. § 5-5-3, and he expected that his accrued, but unpaid annual leave, would be calculated into his final average salary when he retired, resulting in an increased monthly retirement benefit. Because the Board calculated his final average salary under the 1989 amendment, without providing another benefit it its place, Mr. Adams filed suit requesting his unpaid annual leave be calculated in his final salary.

This Court held in Adams that although the Legislature may increase benefits received by a retiring employee, if the Legislature wishes to decrease said benefits, then equal benefits must be offered in their place as just compensation. Id. at 7. Additionally, this Court re-visited their analysis of detrimental reliance. This Court affirmed their holding in Booth:

> The length of time that a public employee pension statute was in effect is not the controlling factor in determining whether a subsequent statutory amendment has unconstitutionally impaired a public employee's contract. The determinative factor, as we held in Booth, is whether the employee may be said to "have substantially relied to their detriment" on the statute. Id. at 8.

As in Adams, Mr. Myers had a contractual obligation with the State of West Virginia. In return for faithful service to the Department of Highways, Mr. Myers would receive,

among other benefits, a retirement annuity. Despite several job opportunities in the private sector, Mr. Myers chose to remain faithful to the Division of Highways, due in part, to the benefits he anticipated receiving. Because of the contractual nature of the State's pension plans, Mr. Myers not only has a right to collect a pension, but he has an expectation, to collect the pension he was promised. An employee has an expectation that his pension will include just compensation for all services rendered by an employee. Services rendered include an employee's decision to work, rather than take vacation through annual leave. The State receives a tangible benefit when its' employees decide to work, rather than take a vacation. Therefore, just compensation includes payment, as prescribed by statute, to those employees who choose to accrue annual leave.

The present case is distinguished from Adams, in that Mr. Adams was eligible to retire under the 1988 amendment, Mr. Myers had already substantially participated in the retirement system by 1988, and is presumed, by law to have detrimentally relied. Booth at 340. As a result, he could have resigned from his State employment, and the lump sum payment he would have received for accrued annual leave would have been calculated into his final average salary, upon receiving retirement benefits at age 62. Therefore, the holdings in Adams are applicable to this case. Mr. Myers relied, unfortunately to his detriment, that he would receive just compensation for his accrued annual leave. Despite several job opportunities in the private sector, Mr. Myers chose to remain faithful to the Division of Highways, in part, to the benefits he anticipated receiving. His decision to remain faithful to his employer does not, under the contractual obligations of the State, create a presumption of acquiesce to the changing statutory language. To the contrary, because Mr. Myers relied on the 1988 statutory amendment to his

detriment, denial of his accrued benefits in the final average salary computation creates an unconstitutional impairment in the pension contract between the State and Mr. Myers.

B. THROUGH THE ENACTMENT OF THE 1989 AMENDMENT TO W.VA. CODE § 5-5-3, THE WEST VIRGINIA LEGISLATURE HAS CREATED TWO CLASSES OF RETIRED EMPLOYEES IN VIOLATION OF EQUAL PROTECTION PRINCIPLES.

The basic principles of equal protection ensure that the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment. Kyriazis v. Univ. of W.Va., 192 W.Va. 60, 67, 450 SE.2d 649, 656 (1994). Here, the West Virginia Legislature has essentially created two classes of retired employees who have over ten (10) years of service with the State – those who retired or resigned under the 1988 amendment, and those who retired or resigned under the 1989 amendment. Because the only distinguishing characteristic between these two groups is the year they chose to retire, the distinction is arbitrary and capricious in nature.

This Court provided a test under equal protection when economic rights are concerned in Gibson v. W.Va. Dep't of Hwys., 185 W.Va. 214, 406 S.E.2d 440 (1991). The courts look to see whether the classification is rational, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons in the class are treated equally. Id. Here, although the statutory provisions related to state employee retirement benefits is a clear and proper state government purpose, not all retired state employees are treated equally.

Mr. Myers is similarly situated to other retired employees who have served the State for more than ten (10) years. However, he is being treated differently than the other class of

employees with more than ten (10) years of service who retired or resigned while the 1988 amendment was in force. This treatment has caused a substantial inequity to Mr. Myers, as he receives approximately $340 less a month than he would if calculated under the 1988 amendment. Frankly, there is no justifiable reason to explain the discrepancy between employees with more than ten (10) years of service who may include the lump sum payment for accrued annual leave in the computation of their final average salary, and those, like Mr. Myers, who cannot.[4]

Finally, the Appellant states that the holdings in Booth and Adams, if left unclarified, will have a significant fiscal impact on all retirement systems administered by the Board and funded by the State. However, the benefit of applying the principles of equal protection far outweighs this argument. Although the Appellees agree that a proper governmental purpose is to maintain fiscal soundness of the State's retirement plans, that purpose cannot be at the expense of treating members of a class.

V. CROSS ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED, PURSUANT TO THE DOCTRINE OF *RES JUDICATA* AND IN EQUITY, BY UPHOLDING THE BOARD'S DECISION REGARDING APPELLEE'S REQUEST TO RETAIN HIS TWO MONTHS SERVICE CREDIT.

As stated, Mr. Myers was employed in the Department of Highways Civil Engineering Co-Operative Program during the summers of 1972, 1973, 1974, and 1975 while an

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[4]Note that although Mr. Myers was not eligible to retire in 1988, had he resigned when the 1988 amendment was in force, the lump sum payment from his then accrued annual leave would have been calculated into his retirement benefits upon reaching the age of 62. Therefore, Mr. Myers was treated differently due to his desire to remain faithful to his employer, the State of West Virginia.

undergraduate student at West Virginia University. Although Mr. Myers did not fulfill the requirements to qualify as a permanent employee while enrolled in the Co-Operative Program, the Department of Highways classified Mr. Myers as an eligible employee from June 5, 1972 to August 21, 1972. During this time, 4.5% of the Appellee's gross income was withheld from his pay and contributed to PERS. Additionally, Mr. Myers was granted two (2) months of service credit.

On May 25, 1999, Mr. Myers submitted a request to the Board for one (1) month additional service time for his work in the summer of 1972, and to buy service time for the summers of 1973, 1974, and 1975. Mr. Myers' request to receive additional service time for 1972 and purchase time for the remaining summers was ultimately denied. However, regarding the two month credit Mr. Myers received in error from the summer of 1972, Conclusion of Law No. 3 by Hearing Examiner Jack W. DeBolt in his March 31, 2000 decision stated: "Although it is clear that Mr. Myers' participation in the system was in error, equity suggests that he be permitted to retain this two-months service credit." Hearing Examiner DeBolt's conclusion goes on to say that if Mr. Myers did not wish to maintain his two months service credit from 1972, he could request the deducted contribution with interest. On May 10, 2000, the Board issued a final order, adopting the recommendations, including all findings and conclusions of law, of Hearing Examiner DeBolt, including his statement that equity suggests Mr. Myers be able to retain his two months service credit. This final decision was not appealed.

Following Mr. Myers' application for retirement benefits in 2007, the error was again discovered. Although Mr. Myers never made such a request, the Division of Highways, as directed by PERS, refunded Mr. Myers his original contribution amount of $39.72, without

interest, on February 6, 2008. The two months of service credit remained on Mr. Myers' annual statement from the Board until February 2008. When Mr. Myers requested that the Board reinstate their May 10, 2000 ruling, his request was denied. Ultimately, the Board denied Mr. Myers' appeal on this issue in a Final Order dated September 3, 2008, as did the Circuit Court of Lewis County in a Final Order entered on July 2, 2009.

First, the doctrine of *res judicata* is applicable to the May 10, 2000 decision of the Board. The doctrine of *res judicata* bars "subsequent litigation of any cause or action which has been previously tried on the merits by a court of competent jurisdiction." Mellon-Stuart Co., v. Hall, 178 W.Va. 291, 298, 359 S.E.2d 124, 131 (1987) citing Syl. Pt. 1, In Re Estate of McIntosh, 144 W.Va. 583, 109 S.E.2d 153 (1959). This Court has recognized that the doctrine promotes several policy goals, such as: "1) To promote fairness by preventing vexatious litigation; 2) To conserve judicial resources; 3) To prevent inconsistent decisions; and 4) To promote finality by bringing litigation to an end. Mellon-Stuart at 131. The issue presented in Mellon-Stuart was whether *res judicata* applied to an adjudication by the court of claims. To determine whether *res judicata* applies to an adjudication by a hearing body, this Court outlined three factors: "1) Whether the body acts in a judicial capacity; 2) Whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and 3) Whether applying the doctrine is consistent with the express or implied policy in the legislation which created the body." Id. at 300. In Mellon-Stuart, this Court held that *res judicata* did apply to adjudications by the court of claims, as it operates in a judicial capacity, with all hearings possessing the indicia of an adversarial judicial proceeding and in conformity with the policies intended by the legislature when the court was created. Id. at 300.

Under Mellon-Stuart, the doctrine of *res judicata* is applicable here. The West Virginia Legislature created the Board by statute to administer the State employee retirement system. The Board acts in a judicial capacity by determining, through a process possessing the indicia of an adversarial proceeding, whether to accept or deny employee's retirement benefit requests. Both parties, the State and the Appellee, were afforded a full and fair opportunity to litigate the two month service credit issue. The Board had already addressed the issue of whether Mr. Myers should receive two months service credit in the Final Order dated May 10, 2000. Said order adopted all of the recommendations, findings of fact, and conclusions of law by the Hearing Examiner, and one of his conclusions of law was that equity alone required that Mr. Myers be able to maintain his two months service credit. Only when the initial error was again discovered in 2008, when Mr. Myers applied for his retirement benefits, did the Board change its' position and take away this benefit that Mr. Myers had relied upon. However, the Final Order dated May 10, 2000, was a final order, appealable to the circuit court. Additionally, public policy mandates that *res judicata* be applied to the Final Order of May 10, 2000, as re-litigation of the final decision is not only unfair to the Appellee, but a waste of judicial resources.

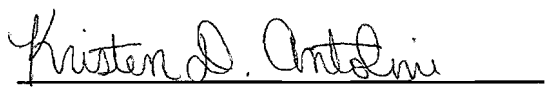
Secondly, equity requires that Mr. Myers be allowed to maintain his two months of service credit. Even though he was not an eligible employee for the purposes of retirement benefits during the summer of 1972, the Division of Highways erred in withdrawing retirement contributions from Mr. Myers' paycheck. However, the error did not stop with a few simple withdraws. Mr. Myers relied, to his detriment, throughout his working life on his statement of retirement benefits provided by the State. Said statement showed that Mr. Myers was entitled to these two months of service credit, until it was suddenly taken away in February 2008. As a

result, Mr. Myers' monthly retirement payment is approximately $20 less as a result of this arbitrary reversal of a final order dated eight years after it was entered.

VI. RELIEF REQUESTED

For the reasons set forth above, the Appellees respectfully requests that the Final Order of the Circuit Court of Lewis County, entered on July 2, 2009, be upheld to require the West Virginia Consolidated Public Retirement Board to include Appellee, Rodney A. Myers' lump sum payment for unused annual leave in calculating his final average salary for purposes of determining his retirement annuity. Additionally, the Appellees request that said calculation be retroactive to February 20, 2009. The Appellees further pray that the same Final Order, in regards to Appellee, Rodney A. Myers' two month service credit be reversed, and that said service credit be retroactively reinstated.

Respectfully Submitted,



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WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent Below (Appellant).

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2010, I served the foregoing **"BRIEF AND CROSS ASSIGNMENT OF ERROR, ON BEHALF OF THE APPELLEES, RODNEY A. MYERS AND DIANE M. MYERS"** upon the following by depositing true copies thereof in the United States mail, postage prepaid, in sealed envelopes, addressed as follows:

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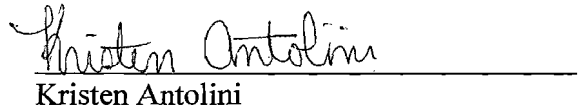

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